

1 PHILLIP A. TALBERT
2 Acting United States Attorney
3 JESSICA A. MASSEY
4 Assistant United States Attorney
5 2500 Tulare Street, Suite 4401
6 Fresno, CA 93721
7 Telephone: (559) 497-4000
8 Facsimile: (559) 497-4099

9
10 Attorneys for Plaintiff
11 United States of America

12
13 IN THE UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,
16 Plaintiff,
17 v.
18 FAUSTO PINA,
19 Defendant.

20 CASE NO. 1:21-CR-00070-DAD-BAM
21 STIPULATION REGARDING EXCLUDABLE
22 TIME PERIODS UNDER SPEEDY TRIAL ACT;
23 FINDINGS AND ORDER
24 CURRENT DATE: October 27, 2021
25 TIME: 1:00 p.m.
26 COURT: Hon. Barbara A. McAuliffe

27 This case is set for status conference on October 27, 2021. On May 13, 2020, this Court issued
28 General Order 618, which suspended all jury trials in the Eastern District of California until further
notice, and allows district judges to continue all criminal matters. Under General Order 618, a judge
“may exercise his or her authority to continue matters, excluding time under the Speedy Trial Act with
reference to the court’s prior General Order 611 issued on March 17, 2020 . . . with additional findings
to support the exclusion in the Judge’s discretion.” General Order 618, ¶ 6 (E.D. Cal. May 13, 2020).
In addition, any judge “may order case-by-case exceptions” to General Order 618’s provisions “at the
discretion of that Judge or upon the request of counsel, after consultation with counsel and the Clerk of
the Court to the extent such an order will impact court staff and operations.” General Order 618, ¶ 7
(E.D. Cal. May 13, 2020). This and other General Orders were entered to address public health
concerns related to COVID-19 (for example, General Order 614—recently extended by General Order
635).

1 Although the General Orders address the district-wide health concern, the Supreme Court has
 2 emphasized that the Speedy Trial Act's end-of-justice provision "counteract[s] substantive
 3 openendedness with procedural strictness," "demand[ing] on-the-record findings" in a particular case.
 4 *Zedner v. United States*, 547 U.S. 489, 509 (2006). "[W]ithout on-the-record findings, there can be no
 5 exclusion under" § 3161(h)(7)(A). *Id.* at 507. Moreover, any such failure cannot be harmless. *Id.* at
 6 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a
 7 judge ordering an ends-of-justice continuance must set forth explicit findings on the record "either orally
 8 or in writing").

9 Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory
 10 and inexcusable—General Orders 611, 612, 617, and 618 require specific supplementation. Ends-of-
 11 justice continuances are excludable only if "the judge granted such continuance on the basis of his
 12 findings that the ends of justice served by taking such action outweigh the best interest of the public and
 13 the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable
 14 unless "the court sets forth, in the record of the case, either orally or in writing, its reason or finding that
 15 the ends of justice served by the granting of such continuance outweigh the best interests of the public
 16 and the defendant in a speedy trial." *Id.*

17 The General Orders exclude delay in the "ends of justice." 18 U.S.C. § 3161(h)(7) (Local Code
 18 T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics,
 19 natural disasters, or other emergencies, this Court has discretion to order a continuance in such
 20 circumstances. For example, the Ninth Circuit affirmed a two-week ends-of-justice continuance
 21 following Mt. St. Helens' eruption. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court
 22 recognized that the eruption made it impossible for the trial to proceed. *Id.* at 767-68; *see also United*
 23 *States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time following the
 24 September 11, 2001, terrorist attacks and the resultant public emergency). The coronavirus is posing a
 25 similar, albeit more enduring, barrier to the prompt proceedings mandated by the statutory rules.

26 In light of the societal context created by the foregoing, this Court should consider the following
 27 case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-
 28

1 justice exception, § 3161(h)(7) (Local Code T4).¹ If continued, this Court should designate a new date
2 for the status conference. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any
3 pretrial continuance must be “specifically limited in time”).

4 **STIPULATION**

5 Plaintiff United States of America, by and through its counsel of record, and FAUSTO PINA, by
6 and through defendant’s counsel of record, Meghan McLoughlin, hereby stipulate as follows:

7 1. By previous order, this matter was set for status on October 27, 2021.

8 2. By this stipulation, defendant now moves to continue the status conference until January
9 12, 2022, and to exclude time between October 27, 2021, and January 12, 2022, under Local Code T4.

10 3. While the parties anticipate that the case may resolve without a trial, this is not yet a
11 certainty. If defendant ultimately does not enter a guilty plea and decides to proceed to trial, the parties
12 agree and stipulate, and request that the Court find the following:

13 a) The government asserts the discovery associated with this case includes reports,
14 photographs, and recordings; initial discovery has been provided to Attorney McLoughlin. The
15 government is aware of its ongoing discovery obligations.

16 b) The parties are in ongoing plea negotiations.

17 c) Counsel for defendant desires additional time to consult with her client, to review
18 the current charges, to conduct investigation and research related to the charges, to review and/or
19 copy discovery for this matter, to discuss potential resolutions with her client, to prepare pretrial
20 motions, and to otherwise prepare for trial.

21 d) Counsel for defendant believes that failure to grant the above-requested
22 continuance would deny them the reasonable time necessary for effective preparation, taking into
23 account the exercise of due diligence.

24 e) The government does not object to the continuance.

25 f) Based on the above-stated findings, the ends of justice served by continuing the
26 case as requested outweigh the interest of the public and the defendant in a trial within the

27 _____
28 ¹ The parties note that General Order 612 acknowledges that a district judge may make
“additional findings to support the exclusion” at the judge’s discretion. General Order 612, ¶ 5 (E.D.
Cal. March 18, 2020).

1 original date prescribed by the Speedy Trial Act.

2 g) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,
3 et seq., within which trial must commence, the time period of October 27, 2021 to January 12,
4 2022, inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv) [Local Code
5 T4], because it results from a continuance granted by the Court at defendant's request on the
6 basis of the Court's finding that the ends of justice served by taking such action outweigh the
7 best interest of the public and the defendant in a speedy trial.

8 4. Nothing in this stipulation and order shall preclude a finding that other provisions of the
9 Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial
10 must commence.

11 IT IS SO STIPULATED.

12 Dated: October 6, 2021

PHILLIP A. TALBERT
Acting United States Attorney

14 /s/ JESSICA A. MASSEY
15 JESSICA A. MASSEY
Assistant United States Attorney

16 Dated: October 6, 2021

17 /s/ MEGHAN MCLOUGHLIN
18 MEGHAN MCLOUGHLIN
Counsel for Defendant
FAUSTO PINA

ORDER

IT IS SO ORDERED that the status conference is continued from October 27, 2021, to **January 12, 2022, at 1:00 p.m. before Magistrate Judge Barbara A. McAuliffe**. Time is excluded pursuant to 18 U.S.C. § 3161(h)(7)(A), B(iv).

IT IS SO ORDERED.

Dated: October 7, 2021

/s/ Barbara A. McAuliffe

UNITED STATES MAGISTRATE JUDGE